

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35892

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION—ACQUISITION
EXEMPTION—CERTAIN ASSETS OF CSX TRANSPORTATION, INC.

Digest:¹ The Massachusetts Department of Transportation (MassDOT) does not need Board authorization to acquire certain physical assets of CSX Transportation, Inc. (CSXT), in Massachusetts. CSXT would retain the legal obligation to provide freight rail service, and MassDOT would not be able to unreasonably interfere with that service.

Decided: March 16, 2015

The Board is granting the motion of the Massachusetts Department of Transportation (MassDOT) to dismiss its notice of exemption filed in this proceeding to acquire certain physical assets from CSX Transportation, Inc. (CSXT). We find that 49 U.S.C. § 10901 does not apply to this sale of physical assets and associated rail right-of-way because the selling carrier would retain an exclusive, perpetual freight rail easement over the rail line together with the common carrier obligation, and the purchaser could not unduly interfere with the provision of freight rail service on the line.

BACKGROUND

On December 19, 2014, MassDOT filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from CSXT approximately 21.2 route miles of railroad assets and associated rail right-of-way generally known as the Framingham Secondary, extending from milepost QBF 0.0 at Mansfield, Mass., to milepost QBF 21.2 at Framingham, Mass. (near CP-21) (the Line).² MassDOT simultaneously filed a motion to dismiss the notice, asserting that the transaction does not require Board authorization because MassDOT would not become a common carrier as a result of the proposed transaction. The Board received letters from United States Representatives Steven F. Lynch (dated December 17, 2014) and Joseph P. Kennedy III (dated January 16, 2015). Both U.S. Representatives requested that the Board consider a delay

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Notice of the exemption was served and published in the Federal Register on January 2, 2015 (80 Fed. Reg. 107).

in ruling on this transaction until the concerns of all impacted communities are addressed.³

MassDOT proposes to acquire from CSXT the physical assets and right-of-way of the Line, subject to CSXT's retention of an exclusive, perpetual easement and obligation to provide common carrier freight rail service on the Line. Under the proposed transaction, MassDOT's designated operator, the Massachusetts Bay Transportation Authority (MBTA), would assume responsibility for maintenance and dispatch of the Line.

MassDOT states that acquisition of the Line would improve commuter rail service by providing direct commuter rail service to Foxboro, Mass., and by allowing it to better coordinate service on the various commuter rail lines extending from the Boston South Station.⁴ According to MassDOT, it plans to upgrade the infrastructure of the Line, which would result in increased capacity, faster operating speeds, and new and improved facilities to support its commuter rail service. Specifically, MassDOT commits to: (1) improvements of track structure to permit rail operations at Federal Railroad Administration (FRA) Class 3 speeds; (2) replacement of the main track and the addition of new siding track at Foxboro; (3) upgrade of certain track and switches; (4) construction of a new Foxboro station track; and (5) installation of new dispatcher switches and switch heaters at various dispatcher-controlled locations.

Under the 2014 Operating Agreement between MBTA and CSXT (Operating Agreement), MBTA would be responsible for maintaining the track in accordance with the FRA rules and regulations for the "agreed upon designated class of track."⁵ If MBTA were to fail to fulfill its maintenance obligations, CSXT could conduct maintenance operations on the Line at MBTA's expense.⁶ MBTA, however, would not be responsible for incremental costs associated with maintenance performed to meet a higher standard of track maintenance than is contractually required.

MBTA would also be responsible for dispatching and control of all trains on the Line pursuant to a dispatch protocol. The dispatch protocol would take into account daily operating windows, while also permitting "reasonable flexibility" within the operating windows to accommodate movement of commuter rail and freight trains (including scheduled and

³ The Board's Office of Public Assistance, Governmental Affairs, and Compliance replied to U.S. Representatives Lynch (by letter dated February 18, 2015) and Kennedy (by letter dated February 10, 2015).

⁴ Exhibit B of the Definitive Agreement between CSXT and MassDOT indicates that the parties do not currently "plan to utilize, or allow another entity to utilize" the Line "to provide Intercity Rail Passenger Transportation." This decision, therefore, addresses only the parties' plans for freight service and commuter rail service, which is outside the Board's jurisdiction under § 10501(c)(2)(a).

⁵ Mot. to Dismiss 30; Ex. D § 2.5(a)(3).

⁶ Ex. D § 2.5(a)(5).

unscheduled CSXT freight trains).⁷ Commuter rail trains seeking dispatch within 10 minutes of their scheduled operating window would have priority over all other trains on the Line.⁸

The Operating Agreement would establish three operating windows for the Line: (1) a commuter rail priority window between 5:00 A.M. and 11:00 A.M. and between 3:00 P.M. and 9:00 P.M. (Commuter Window); (2) a freight rail priority window between 12:00 A.M. and 5:00 A.M. (Freight Window); and (3) a mixed use window between 11:00 A.M. and 3:00 P.M. and between 9:00 P.M. and 12:00 A.M. (Mixed Use Window).⁹ During the Mixed Use Window, MBTA would dispatch trains pursuant to the dispatch protocol. During the Freight and Commuter Windows, freight trains and commuter trains would have priority, respectively. MBTA would also be required to use “best efforts” to schedule maintenance between 7 A.M. and 7 P.M. and “fairly apportion” such maintenance among the affected operating windows.¹⁰

DISCUSSION AND CONCLUSIONS

The question at issue here is whether Board authorization is required for MassDOT to acquire the Line in light of CSXT’s retained exclusive, perpetual, and irrevocable easement to conduct common carrier freight rail operations and the terms of the relevant agreements.

The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval. Where the acquiring entity is a noncarrier, the standard for approval is set out in 49 U.S.C. § 10901, even if the acquiring entity is a state. See Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions, 363 I.C.C. 132, 133 (1980), aff’d sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). But when the carrier selling a rail line retains an exclusive, permanent easement to provide common carrier freight service and has sufficient control over the line to carry out its common carrier obligations, the Board typically has found that authorization is not required and that ownership of the line remains with the selling carrier for purposes of § 10901(a)(4). See Me. Dep’t of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R. (State of Maine), 8 I.C.C. 2d 835, 836-37 (1991); Mich. Dep’t of Transp.—Acquis. Exemption—Certain Assets of Norfolk S. Ry. (MDOT), FD 35606, slip op. at 3 (STB served May 8, 2012); Mass. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc. (MassDOT), FD 35312, slip op. at 6 (STB served May 3, 2010), aff’d sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011). For a transaction to fall within this exception, however, the terms of the sale must protect the selling carrier from undue interference by the purchaser or third-party designee with the

⁷ Ex. D § 2.2(d).

⁸ Ex. D § 2.2(d) (“[I]n all circumstances a scheduled commuter rail train shall hold a priority for as long as it maintains its schedule within a period no longer than ten minutes later than its scheduled time.”).

⁹ Mot. to Dismiss 13-14.

¹⁰ Ex. D § 2.5(a).

carrier's common carrier freight rail service. If MassDOT is found to exercise too much control over CSXT's operations, it would become a rail carrier itself. See MDOT, slip op. 3. We, therefore, look to whether CSXT would retain a permanent, exclusive freight easement and would have sufficient interest in and sufficient control over the Line to permit it to carry out its common carrier freight rail obligation.

We find that the transaction, as proposed, does not require Board approval. The relevant agreements provide that MassDOT would acquire the Line, and CSXT would retain an exclusive, perpetual easement over the Line to provide common carrier freight rail service. CSXT would not transfer its common carrier obligation to MassDOT or MBTA. MassDOT would not hold itself out as a common carrier performing freight rail service.

We are satisfied that the freight rail easement retained by CSXT would be permanent because, under the controlling agreements, freight rail service could be terminated only by obtaining Board authority either to discontinue service over, or to abandon, the freight rail easement.¹¹ The easement preserves CSXT's common carrier rights and obligations unless and until the Board approves a modification of that easement.

The relevant agreements do not otherwise impede CSXT's continuation of common carrier freight rail service. The Operating Agreement sets forth operating windows during which priority would be given to freight or commuter rail service according to the time of day. Even during the Commuter Window, which gives priority to commuter trains, the Operating Agreement would require MBTA to accommodate CSXT's scheduled and unscheduled freight trains with "reasonable flexibility."¹² The Board has found that agreements that restrict freight rail operations to specific times in order to accommodate reliable commuter passenger service are permissible. See Fla. Dep't of Transp.—Pet. for Declaratory Order—Rail Line of CSX Transp., Inc., Between Riviera Beach & Miami, Fla. (FDOT), FD 35783 (STB served Oct. 1, 2014) (citing Md. Transit Admin.—Pet. for Declaratory Order, FD 34975, slip op. at 5-6 (STB served Oct. 9, 2007); Utah Transit Auth.—Acquis. Exemption—Union Pac. R.R., FD 35008, slip op. at 7 (STB served July 23, 2007)). Here, proposed operations would be conducted under provisions that accommodate both commuter and freight trains, and no shippers or other interested persons have raised any concerns about the sufficiency of the planned operating windows or dispatching protocols. We find the restrictions in the agreements do not result in undue interference by MassDOT or MBTA with CSXT's common carrier freight rail service on the Line.

¹¹ See Ex. D § 5.1-5.4.

¹² See Ex. D § 2.2(d).

Under the Operating Agreement, MBTA would be responsible for track maintenance on the Line.¹³ If MBTA were to fail to satisfactorily maintain the Line, CSXT could perform the requisite maintenance itself, at MBTA's expense, so long as it gave MBTA sufficient notice and abided by the applicable operating rules. Because CSXT would be able to maintain the Line itself if necessary, we find these maintenance provisions reasonable and consistent with State of Maine. See FDOT, slip op. at 8.

The Operating Agreement further provides that MBTA would be responsible for dispatching and control of all trains on the Line. MBTA would be required to dispatch and control the trains "in a manner which does not violate CSXT's rights to use" the Line as set forth in the Operating Agreement.¹⁴ MBTA also would be responsible for making "all reasonable efforts to expedite the movement of freight trains."¹⁵ Although the Operating Agreement requires MBTA to "give priority to MBTA commuter trains over all other train scheduling, dispatching and control, including without limitation freight service," MassDOT indicates that such control would be limited by MBTA's contractual obligations to operate "in a manner which does not violate CSXT's rights to use" the Line and "make all reasonable efforts to expedite the movement of freight trains."¹⁶ The Board, therefore, finds that MBTA's control of dispatching would not impair or interfere with CSXT's freight rail service.

The Board has noted that placing maintenance and dispatch control in the hands of the acquiring noncarrier may be allowed when there is a legitimate business justification. MDOT, slip op. at 5 (citing San Benito R.R.—Acquis. Exemption.—Certain Assets of Union Pac. R.R., FD 35225 (STB served June 23, 2011); Fla. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35110 (STB served Dec. 15, 2010)). Here, MassDOT, through MBTA, would assume control of maintenance and dispatching to ensure proper coordination of commuter train and light equipment movement along the commuter rail routes that would be connected via the Line.

We conclude that nothing in the proposed transaction, as structured, would affect the continuing validity of CSXT's exclusive, perpetual freight rail operating easement, or would otherwise permit MassDOT or MBTA to interfere unduly with CSXT's ability to fulfill its common carrier obligation. Therefore, the proposed transaction is consistent with State of Maine, and the continued ownership and assumption of maintenance and dispatching responsibility by MassDOT, and its designee, MBTA, would not constitute acquisition of a railroad line under 49 U.S.C. § 10901(a)(4) or cause MassDOT to become a rail carrier. Under

¹³ MassDOT also would assume maintenance responsibilities for certain rail lines currently owned by MassDOT and maintained by CSXT under a 1985 Trackage Rights Agreement. See Mot. to Dismiss 27 n.33.

¹⁴ Ex. D § 2.4(a).

¹⁵ Id.

¹⁶ Mot. to Dismiss 31.

these circumstances, we find that the proposed transaction does not require Board authorization under § 10901 or an exemption under § 10502.

As noted, U.S. Representatives Stephen F. Lynch and Joseph P. Kennedy III filed comments in this proceeding, requesting that the Board consider a delay in ruling on this transaction. Both Representatives express concerns that potentially impacted communities were not notified about the proposed transaction until October 2014 (nine months after MassDOT agreed to purchase the line from CSXT) and state that local officials and residents have safety concerns regarding the increased speeds with which commuter trains would operate. The Board provided public notice of the proposed transaction in accordance with its regulations through a Federal Register notice published on January 2, 2015, 80 Fed. Reg. 107, and in the more than two months since that notification, no other public comments have been received. The Board finds that there has been adequate time for all interested parties to participate in this process and therefore an extension is unnecessary.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. MassDOT's motion to dismiss the verified notice of exemption in this proceeding is granted.
2. The proceeding is dismissed.
3. This decision is effective on its service date.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.